No. 14,072.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on May 20, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On June 1, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on July 28, 1953.

On August 4, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable Dave Ling, without a jury, and

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[1]"R." refers to Transcript of Record.

on August 26, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 11-12.]

On September 8, 1953, appellant was sentenced to imprisonment for a period of two years and judgment was also entered. [R. pp. 16-17.] Appellant appeals from this judgment. [R. pp. 17-18.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statutes Involved.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.

Statement of the Case.

The indictment charges as follows:

> "Indictment
>
> [U. S. C., Title 50, App., Section 462—Selective Service Act, 1948.]
>
> The Grand Jury charges:
>
> Defendant JOHN HENRY HACKER, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 130, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the Armed Forces of the United States of America on January 14, 1953, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On June 1, 1953, appellant appeared for arraignment and plea, represented by Harold R. Shire, Esq., before the Honorable William M. Byrne, United States District Judge, and entered a plea of not guilty to the offense charged in the indictment.

On July 28, 1953, the case was called for trial before the Honorable Dave Ling, United States District Judge, without a jury, and on August 26, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 11-12.]

On September 8, 1953, appellant was sentenced to imprisonment for a period of two years in a penitentiary. [R. p. 15.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. (App. Spec. of Error 1—App. Br. p. 9.)[2]

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. (App. Spec. of Error 2—App. Br. p. 9.)

C. The District Court erred in denying the Motion for New Trial. (App. Spec. of Error 3—App. Br. p. 9.)

IV.
Statement of the Facts.

On June 3, 1951, John Henry Hacker registered under the Selective Service System with Local Board No. 130, San Bernardino, California. [F. 1-2.][3]

On February 1, 1952, John Henry Hacker filed with the Local Board No. 130, SSS Form No. 100, Classification

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Error;" "App. Br." refers to "Appellant's Brief."

[3]Numbers preceded by "F" appearing herein within brackets refer to pages of Appellant's Draft Board File, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom of the photostatic copies which identifies the page in the Draft Board file.

Questionnaire [F. 8-15.] He failed to indicate his conscientious objections to war, if any, by not signing Series XIV—Conscientious Objection to War. [F. 14.]

On February 25, 1952, John Henry Hacker was classified in Class 1-A by Local Board 130 and was mailed SSS Form 110, Notice of Classification on February 28, 1952. [F. 15.]

On March 5, 1952, the appellant requested a personal appearance before the Local Board. [F. 30.] On March 20, 1952, the appellant appeared before the Local Board in person to inquire why he had been classified in Class 1-A. The Local Board heard the appellant and considered his claim as a minister. [F. 34-35.]

On April 21, 1952, the Local Board continued the appellant in Class 1-A and mailed notice thereof to the appellant. [F. 15.]

On April 29, 1952, the appellant filed an appeal of this classification. [F. 15, 41.] On May 20, 1952, SSS Form 150, Special Form for Conscientious Objector, was mailed to the appellant at the request of Captain Sanders, Coordinator of District No. 6. The Special Form for Conscientious Objector, SSS Form 150, was returned unsigned and unexecuted by the appellant. [F. 15, 42-46.]

On July 17, 1952, the Appeal Board classified the appellant in Class 1-A, and notice thereof was mailed to the appellant. [F. 15, 47, 51.]

On January 2, 1953, the appellant was ordered to Report for Induction on January 14, 1953. [F. 15, 58.]

On January 14, 1953, the appellant reported for induction as previously ordered, but refused to submit to induction into the Armed Forces of the United States. [F. 60.]

V.

ARGUMENT.

The Denial of the Ministerial Exemption by the Appeal Board to the Appellant Was With Basis in Fact and the Classification Given to the Appellant Is Neither Arbitrary nor Capricious.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord,

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is

upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);
United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

The local board carefully considered the claim of the appellant for a minister's exemption, Class 4-D, at a meeting of the local board. [F. 35.] The Appeal Board considered this claim also [F. 31], and both boards rejected it based on the information they had on hand.

The classification of the local board, and thereafter of the Appeal Board is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114 at pages 122-133, stated in this regard:

> ". . . The provision making the decision of the Local Board's 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the

local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

Martin v. United States, 190 F. 2d 775 (4th Cir.), *cert. den.* 342 U. S. 872.

In a recent case, *Dickinson v. United States,* 22 L. W. 4026, the United States Supreme Court held that under the facts presented where the appellant engaged in secular work on a part-time basis, five hours a week as a radio repairman, this would not preclude him from the ministerial exemption of Class IV-D. On the other hand, if a registrant were to be employed on a full-time basis in secular activity, it is probable that his ministerial activities would be incidental in nature so that clearly he would not be entitled to a ministerial Class IV-D exemption.

In this case, the facts do not show clearly that either endeavor carried on by the appellant is incidental to the other. The appellant could rightly have said that he is *the bus driver* for the Chino School District [F. 11-12], for he is in charge of a bus driving children to and from the school, and thus, he may claim it as his main occupation. The appellant asserted to the Local Board that he was a full-time minister. [F. 30.] Thus, there is a question of fact for the Local Board and later the Appeal Board to decide. The Appellee contends that as to this question of fact, the Local Board's and later the Appeal Board's decision should govern in concurrence with *Estep v. United States, supra,* and thus be final.

VI.
Conclusion.

The appellant's job is to convince the local Selective Service Board of his right to a ministerial exemption. If he fails he may pursue his right of administrative appeal. The power to classify rests solely in the Selective Service System. Their decision made in conformity with the regulations is final even though erroneous if there is in fact a basis for such classification. It is submitted that such basis is herein present.

An Order to Report for Induction, based upon such a valid classification, imposes a duty upon the registrant to submit to induction, and the violation by refusal to submit to induction renders the registrant subject to criminal penalties.

No action of the Local or Appellate Board was arbitrary or capricious.

There was no error in the ruling of the trial court in refusing to grant the motion for judgment of acquittal at the close of the evidence.

There was no error of law in the ruling of the trial court, and therefore, the conviction should be affirmed.

We therefore respectfully submit that the judgment of conviction should be affirmed.

Respectfully submitted,

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